

BEFORE
THE PUBLIC SERVICE COMMISSION
OF SOUTH CAROLINA
DOCKET NO. 2020-125-E

IN RE:)	DESC’s Reply to the Department of
)	Consumer Affairs’s Response
Application of Dominion Energy South)	to the Motion to Strike
Carolina, Incorporated for Adjustment of)	Impermissible Expert Testimony
Rates and Charges)	
)	

Dominion Energy South Carolina, Inc. (“DESC” or the “Company”) files this reply to the return of the Department of Consumer Affairs (“Department”) to the Company’s motion to exclude and strike certain portions of the written direct testimony of Scott Hempling, Esquire. Mr. Hempling expends numerous pages of his testimony lecturing the Commission on how other jurisdictions apply foreign law on the presumption of prudence in the rate making context. Mr. Hempling then asks the Commission to ignore settled South Carolina law on that issue and apply his inapplicable interpretation to this matter. Such testimony violates the South Carolina prohibition on expert testimony on issues of law. Therefore, the Commission should reject the Department’s claims and strike the testimony as set forth in the motion.

The Department premises its entire argument on a flawed and rejected assumption. The Department claims that the Commission has “great discretion in admitting evidence” and should therefore admit Mr. Hempling’s improper testimony. See Response p. 2. This argument wholly ignores settled South Carolina law on the admission of expert testimony. Our Supreme Court has held that a tribunal abuses that discretion when it admits expert opinions on legal issues present in the litigation. Dawkins v. Fields, 354 S.C. 58, 66, 580 S.E.2d 433, 437 (2003); see also Green v. State, 351 S.C. 184, 198, 569 S.E.2d 318, 325 (2002) (excluding expert testimony because it “was not designed to assist” the court’s understanding of “certain facts, but, rather, was legal argument”

as to why the court “should rule, as a matter of law,” on the legal question before it); Kirkland v. Peoples Gas Co., 269 S.C. 431, 434, 237 S.E.2d 772, 773 (1977) (affirming the circuit court’s exclusion of expert testimony that “constituted conclusions of law reserved to the province of the court”).

Mr. Hempling admits that is what he seeks to do in this matter. The Department seeks to admit Mr. Hempling’s opinions on the legal framework for the issues present in the case—the presumption of prudence—in order to provide “context” to assist the Commission on use of “its discretion and judgment” to apply inapplicable, foreign law to the Company’s request. See Response p. 4. This argument also ignores that the Supreme Court prohibits an expert from giving the fact-finder (here, the Commission) opinions on the law or its applicability. That is because expert opinions on legal arguments **are not designed to assist the trier of fact in understanding the factual evidence**, and, therefore, they fall outside the scope of Rule 702. Dawkins, 354 S.C. at 66, 580 S.E.2d at 437; Green, 351 S.C. at 198, 569 S.E.2d at 325.

In order to avoid this plain bar to Mr. Hempling’s testimony, the Department brazenly contends that Mr. Hempling offers no “legal opinion.” See Response p. 2. This claim lacks any credibility. A plain reading of the testimony establishes that Mr. Hempling proffers his testimony for his preferred legal standard that he wishes for this Commission to apply.

Mr. Hempling expends pages 10-14 providing his legal interpretation, opinion, and summarization of the law of prudence and cost recovery from the states of Illinois, Iowa, Louisiana, Maryland, Massachusetts, New Hampshire, New York, Oklahoma, Wisconsin, and Vermont as well as the Fifth Circuit Court of Appeals, the Seventh Circuit Court of Appeals, and the federal district court for the District of Columbia. He does so in response to the following questions:

- “What is the prudence standard?” See Response p. 10.
- “How does the prudence standard help achieve the purpose of regulation?” See Response p. 12.

The first question is a quintessential legal standard for this Commission to apply and not a question of fact. Thus, Mr. Hempling’s opinion as to the standard from other jurisdictions violates Rule 702, SCRE. And, with respect to the second question, the Commission acts as the regulator and as such must apply the applicable South Carolina law to legal issues in the case. Mr. Hempling’s opinion on how the Commission should achieve that goal violates Rule 702, SCRE, and Dawkins.

Mr. Hempling then espouses his interpretations and opinions on South Carolina’s presumption of prudence—again, a purely legal concept for the Commission to apply in accordance with South Carolina law. See Response p. 16-22. Quite tellingly, Mr. Hempling admits this section of his testimony is intend to “explain the presumption, critique it, then offer the Commission ideas for how to correct the presumption’s infirmities.” See Response p. 16; see also Response p. 19 (testifying as to “the reasons to modify the presumption of prudence for purposes of this rate case”). Mr. Hempling’s testimony reads like a law review article advocating for new prudency and cost recovery standards that differ from those applicable in South Carolina. That is unequivocally an improper expert argument on issues of law.

That begs the question as to why Mr. Hempling feels the need to correct the presumption’s infirmities. That is because Mr. Hempling recognizes his position conflicts with the applicable South Carolina law on presumption of prudence. As he admits, the South Carolina “Supreme Court has, at least in the past, required [the presumption of prudence].” See Response p. 21. As a result, Mr. Hempling’s positions and opinions offer no value to this Commission in weighing the

factual evidence admitted by the parties. The fact that Mr. Hempling provides his version of the evidence and attempts to link those “facts” to his inapplicable standard does not convert the testimony into expert testimony on the facts. See, e.g., Dawkins, 354 S.C. at 66-67, 580 S.E.2d at 437 (holding that “[a]lthough Professor Freeman arguably offered some helpful, factual information, the overwhelming majority of the affidavit is simply legal argument as to why a party should not obtain the relief it sought). Applying a legal framework that contradicts settled South Carolina law does not assist the trier of fact in understanding the factual evidence that must be considered by this Commission applying that South Carolina law. Id. In sum, Mr. Hempling’s testimony exists for a hypothetical case not before the Commission.

Furthermore, the Department admits in the response that Mr. Hempling’s testimony exists to provide “context” for the legal issues in the case and for the Commission to use “when assessing the reasonableness of DESC’s costs” and to provide the legal “boundaries” and “principles” for the Commission “applying” to the decision in this proceeding. See Response p. 4. Notably, the “legal principles” cited by Mr. Hempling on pages 9-26 are not South Carolina law. In essence, Mr. Hempling seeks to introduce impermissible expert testimony to provide the Commission the legal framework, “boundaries,” and “principles” inapplicable to this proceeding. The only legal framework applicable to this proceeding is South Carolina law. And, South Carolina is clear— a “utility’s expenses are presumed to be reasonable and incurred in good faith.” Utils. Servs. of S.C. v. S.C. Office of Reg. Staff, 392 S.C. 96, 109-110, 708 S.E.2d 755, 762 (2011). Mr. Hempling’s testimony proffers an impermissible theory for the Commission to ignore settled South Carolina

law. The Commission cannot alter settled South Carolina law even if suggested by an alleged expert witness.¹

The Department's characterization of Dawkins further illustrates its misapprehension of South Carolina law on the inadmissibility of expert testimony on legal issues. The Department argues Dawkins can be distinguished because it addressed affidavits on summary judgment and "summary judgment will be primarily legal." See Response p. 6. This argument is simply wrong. Our rule for summary judgment allows the court to grant the motion "when there is no genuine issue as to any material fact." Rule 56(c), SCRPC.

In Dawkins, the petitioners moved for summary judgment and used an affidavit from Professor John Freeman to advise the court on the applicable standard of law to apply to the facts present in the action. Dawkins, 354 S.C. at 63, 580 S.E.2d at 436. The Supreme Court noted that expert testimony "is not objectionable because it embraces an ultimate issue² to be decided by the trier of fact," citing Rule 704, SCRE. However, the Court still held "Professor Freeman's affidavit inappropriately attempted to usurp the trial court's role in determining whether petitioners were entitled to" the relief claimed. Id.

The Supreme Court reasoned that because the expert "proffered his opinion, assuming certain facts" on the legal issue before the trial court, then such "testimony was not designed to assist the [] court to understand certain facts, but, rather, was legal argument why the [] court should rule" on the issue before the trial court. Id. at 66, 580 S.E.2d at 437. The Supreme Court

¹ Moreover, the Commission lacks the authority to utilize Mr. Hempling's proposal in this proceeding. See, e.g., Daniels v. City of Goose Creek, 314 S.C. 494, 498, 431 S.E.2d 256, 260 (Ct. App. 2003) (holding that any modification of Supreme Court case law must be undertaken by the Supreme Court).

² The Department also argues that because an expert is permitted to testify on the ultimate issue, then Mr. Hempling's testimony is permissible. See Response p. 6. This position is flawed because it ignores the next sentence in Dawkins that provides the holding to bar testimony such as Mr. Hempling's.

concluded that “[s]uch ‘testimony’ falls outside Rule 702, SCRE.” Id., see also Green v. State, 351 S.C. 184, 198, 569 S.E.2d 318, 325 (2002) (excluding expert testimony because it “was not designed to assist” the court’s understanding of “certain facts, but, rather, was legal argument” as to why the court “should rule, as a matter of law,” on the legal question before it)

The same holds true in this matter. Mr. Hempling’s testimony violates settled South Carolina jurisprudence, just Professor Freeman’s testimony violated the scope of permissible expert testimony.

Lastly, the Department’s reliance on State v. Morris³ borders on frivolous. In that case, the expert addressed certain hypothetical questions posed by counsel and testified as to whether those situations would comport with securities law. Morris, 376 S.C. at 205, 656 S.E.2d at 367. Critically, the expert based his answers on **existing and applicable South Carolina law**. Id. Here, Mr. Hempling seeks to provide his legal interpretations, opinions, and recommendations on the law of prudence and cost recovery from states **other than South Carolina**. Morris cannot support the admission of Mr. Hempling’s testimony. In fact, Morris supports exclusion of the testimony because applying an inapplicable legal framework that contradicts settled South Carolina law does not assist the Commission in understanding the factual evidence as required by Rule 702, SCRCF.

Conclusion

Pages 9-26 of Mr. Hempling’s testimony violates settled South Carolina law on the admission of expert testimony and should be stricken by the Commission.

Respectfully submitted,

³ 376 S.C. 189, 656 S.E.2d 359 (2008).

s/ Michael J. Anzelmo

Michael Anzelmo
McGuireWoods LLP
1301 Gervais Street, Suite 1050
Columbia, SC 29201
(803) 251-2313
manzelmo@mcguirewoods.com

K. Chad Burgess
Matthew W. Gissendanner
Dominion Energy South Carolina, Inc.
Mail Code C222
220 Operation Way
Cayce, SC 29033
(803) 217-8141
kenneth.burgess@dominionenergy.com
matthew.gissendanner@dominionenergy.com

Mitchell Willoughby
Willoughby & Hoefer, P.A.
P.O. Box 8416
Columbia, SC 29202
(803) 252-3300
mwilloughby@willoughbyhoefer.com
Belton T. Zeigler
Kathryn S. Mansfield
Womble Bond Dickinson (US) LLP
1221 Main Street, Suite 1600
Columbia, SC 29201
(803) 454-6504
belton.zeigler@wbd-us.com
Kathryn.mansfield@wbd-us.com

December 17, 2020

Columbia, South Carolina